WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2017

S.E.M.C.C. File Number: 03-04-2017

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

APPELLANTS
(Respondents)

- and -

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT
MIDWEST PROPERTIES LTD.

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2017

TEAM #2017-08

TO: **THE REGISTRAR OF THE**
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACT

A. Overview of the Respondent's Position

1 This appeal will decide if section 99 of the Ontario *Environmental Protection Act* ("*EPA*") provides due recourse for innocent victims of contamination and chronic pollution. Does section 99 provide a better mechanism than the common law and previous legislation for providing relief to innocent parties?

2 Midwest Properties Limited ("the Respondent") has owned 285 Midwest Road in Toronto since 2007. The Respondent's property adjoins 1700 Midland Avenue, which is owned by John Thordarson and Thorco Contracting Limited ("the Appellants").

3 After discovering petroleum hydrocarbons ("PHC") in the soil and groundwater at 285 Midwest, the Respondent brought an action against the Appellants relying on three causes: breach of s. 99(2) of the *EPA*, nuisance, and negligence.

4 The Ontario Superior Court (the "Superior Court") held that the Appellants were not liable under any of the claimed causes of action. Justice Pollak concluded that the Respondent had not demonstrated any damages. Additionally, she held that awarding damages pursuant to subsection 99(2) of the *EPA* raised the possibility of double recovery. The Respondent appealed.

5 The Ontario Court of Appeal (the "Court of Appeal") allowed the appeal and awarded the Respondent $1,328,000 in damages for the estimated cost of remediating 285 Midwest. The Court of Appeal found that the Respondent had demonstrated damages, specifically diminution of property value and a risk to human health. The Court of Appeal also found that a Ministry of the Environment and Climate Change ("MOECC") order does not preclude recovery of civil damages under subsection 99(2).

6 The Appellants are appealing the Court of Appeal's ruling. The Respondent asks that the Supreme Environmental Moot Court of Canada dismiss this appeal. The Court of Appeal properly found that the Respondent has suffered damages and that the rule against double recovery is not applicable in the case at hand.

7 The Respondent also submits that the proper measurement of damages in this case is the cost of remediation. The purpose of enacting Part X of the *EPA* was to provide a mechanism for

parties who have suffered contamination of their property to recover the costs of remediation. An award based on diminution in property value may not adequately fund remediation.

B. Respondent's position with respect to the Appellants' statement of the facts

8 While largely in agreement with the Appellants' statement of the facts, the Respondent adds the following details for clarification.

(i) A Phase II report was not required, but once obtained it showed increasing contamination

9 In specific response to the Appellants' factum at paragraph 9, the Respondent's first Phase I Environmental Assessment, which was conducted prior to purchasing 285 Midwest, indicated that a Phase II Environmental Assessment report for this property was not required. It was only after completing a Phase II Environmental Assessment on 1700 Midland, which disclosed PHC contamination, that the Respondent acquired a Phase II Environmental Assessment for 285 Midwest.

Midwest Properties Ltd. v Thordarson, 2015 ONCA 819, ("*Midwest* ONCA"), at paras 9, 11,.

10 Adding to the Appellants' factum at paragraph 10, environmental assessments and subsequent studies demonstrated that the contamination at 285 Midwest was increasing over time and much worse than previously thought. Monitoring well 102 showed dissolved PHC in groundwater in 2008, but revealed "free product" in 2011. Similarly, in 2011 monitoring well 101 showed dissolved PHC in groundwater, but revealed "free product" in 2012.

Midwest ONCA, *ibid*, at paras 24-26.

(ii) Order to Remediate

11 As observed by the Court of Appeal but not clearly acknowledged by the Appellants at paragraphs 11-13 of their factum, "[f]rom 1998-2011, Thorco was in almost constant breach of its license and/or compliance orders" issued by the MOECC. Additionally, numerous reports and orders, unmentioned by the Appellants, indicate that PHC was entering the ground at 1700 Midland for nearly a decade prior to the Respondent acquiring 285 Midwest.

Midwest ONCA, *supra* para 9, at paras 2, 15, 17, 19.

(iii) Additional facts regarding the proceedings before the Ontario Superior Court

12 At trial, all three expert witnesses testified that purchasers might be less willing to acquire contaminated property. The Appellants' expert testified that willingness "depends on the risk tolerance of the potential buyer." The Respondent's witnesses further testified that PHC contamination would lower the value of property, make it more difficult to obtain financing, or both. Mr. Vanin, testifying for the Respondent, stated that 285 Midwest is "not a property that any lender would probably want on their books." Mr. Tossell, also testifying for the Respondent, stated that "[a]ny contaminated property comes with stigma" and that it might be difficult to obtain financing for a contaminated property.

Midwest ONCA, *supra* para 9, at paras 28-30, 99.

13 Additionally, Mr. Tossell testified that the concentration of PHCs found at 285 Midwest are volatile and constitute a risk to human health. Mr. Tossell testified that there is a risk that the volatile PHC will get into the building and that this is a potential health risk to the occupants.

Midwest ONCA, *supra* para 9, at para 100.

14 The Superior Court accepted Mr. Tossell's evidence that groundwater flows from 1700 Midland to 285 Midwest and that the contamination at 1700 Midland had necessarily migrated onto and contaminated 285 Midwest.

Midwest Properties Ltd v Thordarson, 2013 ONSC, ("*Midwest* ONSC"), at para 8.

15 The Appellants' submission regarding the evidence presented at trial concerning remediation costs at is incomplete and requires clarification. The Respondent's expert evidence concluded that the reasonable costs of remediating 285 Midwest would be $1,328,000. While the Appellants' expert disagreed with these estimates, the Appellants did not lead any positive evidence on the cost of remediating 285 Midwest.

Appellants' Factum, at para 15.

Midwest ONCA, *supra* para 9, at para 31.

(iv) Additional facts regarding the proceedings before the Ontario Court of Appeal

16 On appeal, the Court of Appeal concluded that an MOECC remedial order and recovery of damages under subsection 99(2) are not mutually exclusive. Based on this conclusion, the Court held that the trial judge had erred in concluding that recovery under subsection 99(2) is not permitted when the defendant is under a standing MOECC order to remediate. The Court further

held that the possibility of double recovery should not prevent an order for damages for the remediation of contaminated property under subsection 99(2) where the MOECC has already ordered the remediation of the property.

Midwest ONCA, *supra* para 9, at paras 52-53, 55.

17 Additionally, the Court of Appeal held that the trial judge erred in concluding that the Respondent had failed to establish damages. In contrast to the Superior Court and the Appellants' submissions at paragraph 18, the Court found that Messrs. Vanin and Tossell are experts in the environmental assessment of real estate and as such have general expertise on how contamination affects property values. Based on their testimony, the Court accepted that there was "uncontradicted evidence" that the Respondent had demonstrated damages stemming from both diminution of property value and human health risks.

Appellants' Factum, at para 18.

Midwest ONCA, *supra* para 9, at paras 99-101.

18 The Court held that awarding damages under subsection 99(2) based on the cost to remediate is more consistent with the provision than the diminution of property value. The Court based its decision on the wording of the provision, the common law trend to award restorative damages, the polluter pays principle, and the entire purpose of the enactment of Part X of the *EPA*.

Midwest ONCA, *supra* para 9, at paras 60-70.

PART II -- THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

19 With respect to the three questions at issue for which leave was granted, as identified by the Appellants at Part II of their factum, the Respondent's position is as follows.

20 On the first issue, the Court of Appeal correctly held that liability under subsection 99(2) of the *EPA* is not dependent on establishing an actionable nuisance at common law.

21 On the second issue, the Court of Appeal correctly held that damages are not precluded under subsection 99(2) of the *EPA* where the MOECC has already ordered the Appellants to remediate the Respondent's property.

22 On the third issue, the Court of Appeal correctly held that the appropriate measure of damages under subsection 99(2) of the *EPA* is the cost of remediation of the Respondent's property as opposed to diminution in property value.

PART III -- ARGUMENT

A. The Court of Appeal correctly held that liability under s. 99(2) of the *EPA* is not dependant on establishing an actionable nuisance at common law

23 The Respondent submits that the Court of Appeal correctly held that the standalone statutory cause of action created by subsection 99(2) is separate from a common law nuisance action. At the core of the Court's compelling argument was the recognition that subsection 99(2) was enacted to provide "a flexible statutory cause of action that superimposed liability over the common law."

Midwest ONCA, *supra* para 9, at para 73.

24 The Appellants have not submitted any justification for this Honourable Court to overturn the Court of Appeal's conclusion that nuisance is not required for a subsection 99(2) claim. In fact, the Appellants expressly *concede*, at paragraph 44 of their factum, that liability under subsection 99(2) is *not* dependent on proving nuisance at common law.

Appellants' Factum, at para 44.

25 Retreating from the question on which they obtained leave to appeal, the Appellants now suggest a different error. They contend that the Court of Appeal erred in finding, as a fact, that the Respondent has suffered damages. The Appellants attempt to fit their challenge to this factual finding into the legal question on which leave was granted, arguing that subsection 99(2) claimants must prove damages. Specifically, they argue that subsection 99(2) damages must be proven according to the common law standard for nuisance.

Appellants' Factum, at paras 29, 37, 39, 41, 43, 45.

26 Damages recoverable in common law nuisance actions are restrictive relative to the damages recoverable under subsection 99(2). Indeed, as set out below, the fundamental purpose of section 99 was to expand the right to compensation compared to that available at common law. With respect, the Appellants have inappropriately sought to read down the definition of

"loss or damage" under section 99 of the *EPA* by trying to limit it to damages available under common law nuisance.

27 Further, there is no question that the Respondent has suffered damages, as the Court of Appeal properly found on the evidence. The Court of Appeal found that the Respondent had suffered damages in the form of diminution of property value and risk to human health.

Midwest ONCA, *supra* para 9, at paras 98-101.

28 The Court of Appeal correctly held that subsection 99(2) aims to, "provide a flexible statutory cause of action that superimposed liability over the common law." Using the modern approach to statutory interpretation, by looking at the wording of subsection 99(2), the surrounding context, and the intention of the legislature, the Court of Appeal correctly held that under subsection 99(2), plaintiffs have an extended right to compensation than what is available in the common law.

Midwest ONCA, *supra* para 9, at paras 48, 73.
Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42, ("*Bell ExpressVu*"), at para 26.

(i) <u>The *EPA* must be interpreted expansively</u>

29 The *EPA* is Ontario's principal environmental legislation. Its purpose is to "provide for the protection and conservation of the natural environment."

EPA, s 3.

R v Castonguay Blasting, 2013 SCC 52, ("*Castonguay Blasting*"), at para 9.

R v Canadian Pacific Ltd, [1995] 2 SCR 1031, at para 84.

30 In *R. v. Castonguay Blasting Ltd.*, the Supreme Court of Canada held that the *EPA*'s "intended reach is wide and deep." The Appellants' restrictive reading of subsection 99(2) is inconsistent with the appropriate approach to interpreting environmental legislation broadly, and specifically the *EPA*.

Midwest ONCA, *supra* para 9, at paras 50-51.
Castonguay Blasting, *ibid*, at para 9.

(ii) In enacting section 99, the legislature intended to extend the right to damages arising from contamination caused by spills

31 The Court of Appeal correctly held that the legislature intended to create a "separate, distinct ground of liability for polluters."

Midwest ONCA, *supra* para 9, at paras 49, 73.

32 The legislative history surrounding the enactment of Part X clearly demonstrates that the legislature intended to build on to the common law, not merely to affirm or codify it. When Bill 209 was introduced, the Honourable Minister Parrott announced that the bill's object was to, "create liability for compensation for damage resulting from a spill which clarifies *and extends* the right to compensation at common law" (emphasis added).

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, Vol 5, No 151 (14 December 1978) at 6178, ("*Hansard, First Reading of Bill 209*").

33 Indeed, even when the legislature amended and reintroduced the bill as Bill 24, the goal of clarifying and extending the right to compensation at common law was reaffirmed.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, Vol 1, No 8 (27 March 1979) at 255, ("*Hansard, First Reading of Bill 24*").

34 Additionally, when Bill 24 was moved for a second reading, opposition party members of the legislature, such as MLA Marion Bryden, expressed that Part X, "establishes a new concept of liability."

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, Vol 2, No 47 (15 May 1979) at 1955, ("*Hansard, Second Reading of Bill 24*").

35 Part X eliminates weaknesses that existed in the common law and existing environmental legislation. When Bill 209 was introduced, Minister Parrott acknowledged that both were "inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment." When Bill 24 was moved for a second reading, Ms. Bryden stated it was "difficult to establish liability or obtain any justice for the victims under existing legislation and common law."

Hansard, First Reading of Bill 209, *supra* para 32, at 6178.

Hansard, Second Reading of Bill 24, supra para 34, at 1952.

36 When Bill 24 was introduced, Minister Parrott stated that Part X aimed to "provide a better mechanism for recovering costs and damages from responsible parties."

Hansard, First Reading of Bill 24, supra para 33, at 1952.

37 To now interpret Part X as simply codifying the existing common law would frustrate its legislative purpose.

(iii) As shown by its text, context and purpose, subsection 99(2) aims to extend the right to damages

38 Subsection 99(2) of the *EPA* provides that:

> "…Any…person has the right to compensation… for loss or damage incurred as a direct result of…the spill of a pollutant that causes or is likely to cause an adverse effect"

EPA, s 99(2).

39 The definition of "loss or damage" for the purpose of section 99 "includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income."

EPA, s 99(1).

40 The legislature deliberately drafted a non-exhaustive definition by using the term "includes." When interpreting statutes, the term "includes" is meant to "emphasize the broad range of general language and to ensure that it is not inappropriately read down."

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014), at 74.

41 The Appellants ask this Honourable Court to read down of the definition of "loss or damages" in subsection 99(1). This is an inappropriate limitation that is counter to the wording of section 99 and the purpose of Part X.

42 The damages available to a plaintiff in nuisance are narrower than those available pursuant to subsection 99(2). Whereas "loss or damages" under subsection 99(2) includes (but is not limited to) "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income," a common law nuisance is actionable only when it "causes physical injury to, or substantially interferes with, the use or enjoyment of or an interest in the land in question."

Appellants' Factum, at para 45.

EPA, s 99(1).

St. Pierre v Ontario (Minister of Transportation and Communications) [1987] 1 SCR 906 (SCC), at para 10.

Midwest ONCA, *supra* para 9, at para 71.

43 If the Appellants' argument is accepted, a plaintiff will only be successful in a claim under subsection 99(2) if it can demonstrate that a spill substantially interferes with the quality of its land or its use, enjoyment, or interest in said land. This constitutes a reading down of subsection 99(1).

(iv) The Court of Appeal correctly distinguished *Hollick* and *Inco* with respect to the Respondent's damages

44 The decisions the Appellants rely on to support their argument that the Respondent has not proven damages pursuant to subsection 99(2), namely *Hollick* and *Inco*, are neither binding nor persuasive. Additionally, they are readily distinguishable.

Appellants' Factum, at paras 41-42, 51-54

Hollick v Metropolitan Toronto (City) (1999), 46 OR (3d) 257, 181 DLR (4th) 426 (Ont CA), ("*Hollick*").

Smith v Inco Limited, 2011 ONCA 628, ("*Inco*").

45 The Court of Appeal correctly found that neither *Hollick* nor *Inco* are applicable to assessing a plaintiff's case under section 99 of the *EPA*.

Midwest ONCA, *supra* para 9, at paras 75-76, 102.

46 In *Hollick*, the Court of Appeal stated the following: "The statement of claim alleges negligence, nuisance, a claim based on *Rylands v. Fletcher* and on s. 99 of the Environmental Protection Act...No one of these claims can be established unless a nuisance is proved…" To be clear, the Court was not deciding the *merits* of a section 99 claim. Rather, the Court was deciding whether to certify a class for a class action.

Hollick, *supra* para 44, at para 18.

47 When the Court in *Hollick* stated that none of the plaintiff's claims could be established "unless a nuisance is proved," it was not installing a legal requirement of an actionable nuisance before recovery is possible under subsection 99(2). If that proposition is accepted, then it must equally apply to all the other causes the plaintiff alleged in *Hollick*, including negligence and *Rylands v. Fletcher*. However, it has never been the law that nuisance is a precondition to negligence, and this cannot be what the Court intended in *Hollick*. The term "nuisance" was used

by the Court to describe a common injury that all the plaintiffs in the class must have suffered to justify class certification.

Midwest ONCA, *supra* para 9, at paras 75-76.

Hollick, *supra* para 44, at para 18.

48 The Respondent's case is also distinguishable from *Inco*. The court in *Inco* was evaluating a claim for nuisance and not a subsection 99(2) claim, under which there is an extended right to compensation. Further, the legal thresholds for damage imposed by the Court of Appeal in *Inco* were novel and contentious

Inco, supra para 44, at para 1.

49 In any event, in *Inco*, there was no evidence that the soil contamination posed a health risk to the occupants or diminished property values. In the case at bar, there was uncontroverted evidence of both types of damage. Experts gave evidence of the general effect of such contamination on property values. The PHC contamination under the building at 285 Midwest was found to be a volatile fraction, constituting a risk to human health. The Court of Appeal correctly found that there was "evidence of physical and material harm or injury to the property," and distinguished it from *Inco.*

Inco, *supra* para 44, at para 52.

Midwest ONCA, *supra* para 9, at paras 98-102.

(v) <u>The Court of Appeal correctly held that the trial judge made a palpable and overriding error in finding the Respondent had not proven damages</u>

50 In the case at hand, the Court of Appeal correctly held that the trial judge made a palpable and overriding error. Faced with expert testimony that substantiated the Respondent's claims for damages, the trial judge ignored this evidence. In light of this palpable and overriding error, the Court of Appeal correctly made its own factual findings with respect to the damages suffered by the Respondent.

Midwest ONCA, *supra* para 9, at paras 98-101, 104-105.

51 The standard of review for findings of fact is whether the trial judge has made a "palpable and overriding error." An error will reach this level when it is one that is "plainly seen."

Housen v Nikolaisen, 2002 SCC 33, at paras 1-6, ("*Housen*").

52 Specifically, an omission is a material error if it "gives rise to the reasoned belief that the trial judge must have forgotten, *ignored* or misconceived the evidence in a way that affected his conclusion" (emphasis added).

Housen, ibid, at para 39, citing *Van de Perre v Edwards,* 2001 SCC 60, at para 15.

53 It was appropriate for the Court of Appeal to rely on the Respondent's evidence with respect to property value. Messrs. Vanin and Tossell have expert knowledge of the relationship between particular contaminants and their general effect on property values. As such, they were qualified to make expert statements on whether the PHC contamination would lower the value of property or make it more difficult to obtain financing.

Midwest ONCA, *supra* para 9, at para 99.

54 The contamination at 285 Midwest also posed a human health risk. Mr. Tossell testified that there is a risk that the volatile PHC will infiltrate the building, posing a potential health risk to the occupants. The Court of Appeal correctly found that this health risk is evidence of physical and material harm or injury to property.

Midwest ONCA, *supra* para 9, at para 100-101.

55 In the case at hand, there was "uncontradicted evidence at trial that established a diminution in value of the [Respondent's] property and a human health risk." From this finding, the Court was correct to conclude that the trial judge had "made findings that damage had not been established without reference to the evidence at trial."

Midwest ONCA, *supra* para 9, at paras 98-101.

B. The Court of Appeal correctly held that damages were not precluded under subsection 99(2) of the *EPA* where the MOECC had already ordered the defendant to remediate the plaintiff's property

56 The Court of Appeal correctly held that under the *EPA* "a person can, as a result of a spill, be subject to various remedial or preventative orders" at once, as "these consequences are complementary, not exclusive of one another."

Midwest ONCA, *supra* para 9, at para

(i) The doctrine of *restitutio in integrum* cannot preclude a private party from seeking damages under subsection 99(2)

57 The MOECC issued a remedial order in accordance with their legal duty under subsection 17 of the *EPA*, which ordered the Appellants to "repair the damage or injury" their spill had caused to the "natural environment." The Respondent also agrees that the MOECC should not be relieved of this obligation under the *EPA*.

EPA s 17.

Appellants' Factum, at para 72.

58 Simultaneously, but independently of the MOECC, the Respondent sought a private action seeking damages for nuisance, negligence, and a breach of subsection 99(2).

59 The MOECC's order is regulatory, which aims to correct the natural environment, while the Respondent brought forward a private action to obtain compensation for the damages they suffered as a result of the Appellants' spill.

60 The Appellants' submission that an MOECC remedial order should preclude a private lawsuit under subsection 99(2), is, therefore, inconsistent with the purpose of the *EPA* overall. The Appellants acknowledge this conclusion at paragraph 56 of their factum.

Appellants' Factum, at para 56

61 As such, the Court of Appeal was correct in holding that applying two separate subsections under the *EPA* does not de facto equate to double recovery.

(ii) The doctrine of *restitutio in integrum* cannot preclude a private party from seeking damages under subsection 99(2).

62 The Court of Appeal correctly held that the possibility of double recovery should not prevent an order for damages when dealing with the remediation of a contaminated property under subsection 99(2) where the MOECC has already ordered the restoration of said property.

Midwest ONCA *supra 9*, at para 55

63 *Gilbert v. South* established that unless double recovery is "patently clear," it should not be the sole basis for a Court to refuse an award of damages. This holding was later upheld by Justice Laskin, who agreed that double recovery can only influence a court's decision where

there is no uncertainty that the plaintiff will receive the benefits, the value of the benefits, or the expenses covered by the benefits deemed to be double recovery.

Gilbert v South, 2015 ONCA 712, citing *Gilbert* v. *South*, 2014 ONSC 3485 at para 9

64 In the present case, the Court of Appeal reached its decision in part because the Appellants had "not cleaned up their property, or 285 Midwest, since being ordered to do so in 2012." The Appellants acknowledged this fact.

Midwest ONCA, *supra* para 9, at para 55.
Appellants' Factum at para 65.

65 The Respondent submits that in the case at bar there was no certainty that Midwest would receive the benefits, the value of the benefits, or the expenses covered by the benefits granted by the MOECC's remedial order. The Court of Appeal was appropriate to dismiss the risk of double recovery in awarding damages under subsection 99(2).

Midwest ONCA, *ibid*, at para 55

66 The Respondent agrees that the doctrine of *restitutio in integrum* aims to restore victims to the position they were in prior to a loss or harm being committed. The Respondent also acknowledges that *restitutio in integrum* seeks to ensure that parties are not over-compensated, or awarded "double recovery." However, double recovery requires that a party receive compensation for the same damage from various sources, and this did not occur in the present case.

Appellants' Factum, at para 67

67 As the Appellants acknowledge, the MOECC committed to redirecting their remedial order if the Court of Appeal found in favour of the Respondent. This would strip the Appellants of any responsibility to remediate 285 Midwest.

Midwest ONCA, *supra* para 9, at para 55.

68 In any case, the MOECC order will be enforced. Redirecting the order to the Respondent will ensure that the awarded damages will be used to remediate 285 Midwest. This eliminates the possibility of a windfall, while simultaneously upholding the inherent purpose of the *EPA*.

(iii) The mere specter of double recovery cannot prevent the Court of Appeal from awarding a private party damages under subsection 99(2)

69 Courts must not use a remote or hypothetical possibility of double recovery as a reason to deny damages under subsection 99(2). This Court has been offered no reason to find that the MOECC will not be true to its word.

Appellants' Factum, at para 57 & 59.

70 The Respondent agrees with the Appellants' factum at paragraph 65, that decisions pertaining to double recovery should not be determined purely based on speculation. The Respondent's acknowledge this line of reasoning, and submit that it should be applied when considering the MOECC's commitment to redirect their remedial order.

Appellants' Factum, at para 65

71 The remote possibility that MOECC will retreat from its position before the Court of Appeal is not sufficient to decline an award of damages. There is no reason for this Court not to take the MOECC at its word. The Appellants merely speculate that the MOECC will not do what it has promised to do.

C. The Court of Appeal correctly decided that the cost of remediation is the proper measurement of damages

72 The Court of Appeal correctly held that damages based on remediation was correct. Awarding damages for the costs of remediation is consistent with the legislative purpose of the *EPA*, the polluter pays principle, a marked trend in the law, and is most reasonable in the circumstances.

(i) The legislative purpose of subsection 99(2) supports awarding remediation costs as the proper measure of damages

73 The Court of Appeal's decision to award damages based on remediation was correct. Notably, this approach better fulfills the legislative purpose of the *EPA* because it would ensure that a plaintiff can remediate the damages to the environment caused by a defendant's conduct. As the purpose of the *EPA* is environmental protection and conservation, damages should be tailored to this purpose by adequately funding remediation.

EPA, s. 3.

74 In the case at bar, damages in the form of diminution of property value may not adequately fund cleanup.

Midwest ONCA, *supra* para 9, at para 63.

75 As recognized by the Ontario Law Reform Commission, "the ultimate goal of the courts should be to ensure that the environment is put in the same position after the mishap as it was before the injury."

Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ontario Law Reform Commission, 1990), at 55.

76 In keeping with the purpose of the *EPA*, the restoration approach is superior because the costs of restoration may exceed the diminution of property value. Where this is the case, and damages for diminution of property value are awarded, a plaintiff would lack adequate funds to remediate.

Bruce Pardy, Environmental Law: A Guide to Concepts (Markham, ON: Butterworths, 1996), at p. 223. cited in *Midwest* ONCA, *supra* para 9, at para 62

77 This Court should give meaningful force to the purpose of the *EPA*. As Justice Abella writes, on behalf of the Supreme Court in *Castonguay Blasting Ltd v. Ontario:* "Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep."

EPA, s 3(1).

Castonguay Blasting, *supra* para 29, at para 9.

78 The Appellants allege that awarding costs for remediation does not further the *EPA*'s legislative purpose. They suggest that there is "no guarantee" that the Respondent will use the damages award to remediate the land. They suggest that such an award will only benefit the respondent, not the environment. Such suggestions are demonstrably false, given the facts of this proceeding.

Appellants' Factum, at paras 76, 79, 81, 86.

79 Should this Honorable Court award damages for the cost of remediation, the MOECC, as stated above, will redirect their order to remediate to the Respondent.

Midwest ONCA, *supra* para 9, at para 55.

80 As a matter of public policy, damages should be awarded in accordance with the legislative purpose. In the case at bar, this means awarding the costs of remediation. The Court of Appeal rightly aired on the side of ensuring that the damages award sufficed for cleaning up the PHC waste by awarding the higher measure. This would not only favour environmental protection and conservation in the case at bar, but will set a helpful precedent in future litigation. As a general principle, it is better to favour the innocent party when the alternative is to leave the protection of the environment in the hands of an incalcitrant polluter.

Midwest ONCA, *supra* para 9, at paras 62-63

81 The Appellants allege that because the damages award of $1,328,000 is an estimate, the Respondent will be incentivised to cut costs to maximize its "windfall." Respectfully, this Court must reject this argument. The uncertain nature of the estimate cuts both ways. The estimate is equally likely to be insufficient for carrying out a full remediation of the land. Uncertainty is a reality that the courts deal with in all areas of tort law and is a consequence that the administration of justice accepts.

Appellants' Factum, at para 80

(ii) A ruling in favour of awarding costs for remediation is most consistent with the polluter pays principle

82 The polluter pays principle states that, wherever possible, the party that caused the pollution should pay for the remediation, compensation, and prevention. The polluter pays principle has become firmly entrenched in Canadian law. Part X of the *EPA* is effectively a statutory codification of this principle.

Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58, [2003] 2 SCR 624, at para 23.

83 The Appellants allege that awarding damages for remediation will not fulfill the polluter pays principle, arguing that awarding one form of damages is "in no way superior or more consistent" with the polluter pays principle. However, the polluter pays principle requires that the polluter pays for remediation. This goal is best achieved by awarding damages for costs of remediation. The alternative is to risk the pattern of environmental neglect we have seen for the past 20 years in the appellants' conduct.

Appellants' Factum, para 84, 85, 86.

(iii) There is a marked trend in the law towards awarding remediation costs

84 The Court of Appeal was correct in finding that there is a trend towards awarding damages in favour of costs for remediation. The present appeal provides this Honourable Court with an opportunity to confirm that trend and its underlying environmental protection objectives.

85 The Appellants deny that there is a trend favouring awarding remediation of damages and considers the Court of Appeal's identification of this trend as an error of law. The Appellants suggest that the cases cited by the Court of Appeal do not "definitively conclude" that there is a trend or not. Instead, the Appellants suggest that the cases cited simply demonstrate that courts must be flexible in their approach to awarding damages

Appellants' Factum, paras 88, 90.

86 In response, the Respondent agrees that courts should be flexible in designing appropriate relief specific to the circumstances. In this case, the facts are that the Appellants have failed to remediate despite being ordered to do so. Further, if this Court grants remediation costs, the MOECC will redirect its remediation order to the Respondent. In these circumstances, remediation costs are appropriate.

Midwest ONCA, *supra* para 9, at para 55.

87 The cases of *Jens* and *Horne*, relied on in the Court of Appeal decision, demonstrate the Courts' general willingness to award costs of remediation. Although these take place in a residential context, the importance of these decisions is in the courts' willingness to award damages for remediation even when the award would exceed the diminution of property value.

Jens v Mannix Co (1978), 89 DLR (3d) 351 (BCSC).
Horne v New Glasgow, [1954] 1 DLR 832 (NSSC).
Midwest ONCA, *supra* para 9, at para 61

88 In her article "Deconstructing Tridan," the now Justice Katherine M. van Rensburg addresses the *Tridan* decision in which remediation costs were granted. She suggests that the costs for repair are withheld where it is clear that the plaintiff has no intention to repair the land. This is consistent with the finding in *Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd.* ("*Canadian* Tire") where there was a clear intent to remediate. This intent indicated a higher likelihood for the money to be used for remediation. In the case at bar, the Appellants have

provided little evidence indicating that they will carry out their orders to remediate, and it is safe to suppose that they will not. In comparison, the Respondent is more likely to remediate the land. Nothing suggests otherwise. Indeed, the MOECC will order them to do so if costs to remediate are awarded.

> Katherine M. van Rensburg, "Deconstructing Tridan: A Litigator's Perspective" (2004) 15 J Envtl L & Prac 85, at p. 89
>
> *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd*, 2014 ONSC 288, at para 321.

89 While one case does not make a countertrend, the Appellants rely solely on one decision of the New Brunswick Court of Queen's Bench in *Cousins v McColl Frontenac Inc*. To date, this case has not been cited in in any jurisdiction to support an award for diminution of property value over the costs for remediation. This is not sufficient to disprove the trend of courts awarding damages valued based on the costs of remediation.

> *Appellants' Factum*, at para 99.
>
> *Cousins v McColl Frontenac Inc*, 2006 NBQB 406, aff'd 2007 NBCA 83.

(iv) Awarding the cost of remediation is the more reasonable option

90 The trend towards awarding damages based on costs for remediation is set out above. The Respondent further submits that awarding damages for remediation is most reasonable in this case. In particular, the Appellants have a long history of neglecting their obligations to the MOECC. The Appellants have been in violation of MOECC orders and regulations for a period of over 20 years, from 1988 to 2011. This should give this Honorable Court little faith that the Appellants will comply with the order to remediate.

> *Midwest* ONCA, *supra* para 9, at para 2.

91 In arguing that remediation costs are unreasonable, the Appellants take the principle of *caveat emptor* out of its proper legal context. This legal principle is intended to protect a seller of land from liability for defects in the land where the purchaser has failed to perform due diligence. The case at bar is not between a buyer and seller, and therefore the principle has no application.

> *Appellants' Factum*, at para 104-105.
>
> *Nixon v. MacIver* 2016 BCCA 8at 39 citing *Cardwell v Perthen* 2006 BCSC 333 at 119.

92 The Appellants also submit that, since there was no knowledge of the extent of the pollution at the time of purchase, there is no baseline from which to assess damages. In reply, the Respondent submits that the lack of a baseline does not matter in the context of remediation because the goal of remediation is to rid the property of the harmful waste deposited by the appellants.

Appellants' Factum, at para 105

93 The Appellants state that awarding diminution of property value fairly compensates the Respondent while serving the legislative purpose of the *EPA* because the Appellants will remain under an order by the MOECC to remediate the land. As noted above, the Appellants have neglected to obey any of the orders of the MOECC for over two decades. There is no reason this Honorable Court should expect that the order to remediate will be carried out by the Appellants. The Respondent is more likely to carry out the order to remediate, should damages be awarded based on cost of remediation.

Appellants' Factum, at para 106.

Midwest ONCA, *supra* para 9, at para 55.

Respondent's Factum, at para 91.

94 Finally, the Appellants have requested that the damages, if awarded on the basis of costs for remediation, be paid to this Court in trust to ensure that the land is remediated. This novel and administratively burdensome proposal is unnecessary. The MOECC will redirect the order to remediate from the appellants to the respondent. This should satisfy the courts that the damages award will be used for its intended purpose. The MOECC can and should be responsible to enforce the order, without the need to turn this Honourable Court into the enforcer of remediation efforts.

PART IV -- ADDITIONAL ISSUES

95 The Respondent does not raise any additional issues

PART V -- SUBMISSIONS IN SUPPORT OF COSTS

96 The Respondent respectfully requests that the judgment of the Ontario Court of Appeal be upheld, with costs being awarded to the Respondent throughout.

97 The Respondent also respectfully request that this Honourable Court dismiss the Appellants' request that if this appeal is denied, it should be denied without an award for costs. When dealing with a judgement of costs, the Supreme Court of Canada has laid out se

> *Appellants' Factum*, at para 109

98 The Appellants have provided no reason or legal citation in support of such a novel request, and completely ignore the guidelines regarding costs set out in *British Columbia* v *Okanagan* (2003). As this is a private action between two private parties, and therefore not being litigated for the purposes of public interest, it is unreasonable to expect that a party should not be held liable for costs if judgement is awarded against them.

> *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371 at para 24 citing *Skidmore v Blackmore* (1995), 2 BCLR (3d) 201 at para 44.

PART VI -- ORDER SOUGHT

99 It is respectfully requested that this Honourable Court dismiss the Appellants' appeal and affirm the judgement of the Court below, with costs being awarded to the Respondent throughout.

102 It is further requested that this Honourable Court dismiss the Appellants' request that damages be re-evaluated based on a diminution in property value rather than based on the cost of remediation.

103 The Respondents would also like to request that this Honourable Court reject the Appellants' novel submission that any damages based on remediation costs should be held in trust by this Court.

104 To allow awarded damages to be held in trust until the Respondent demonstrate that they intend to use their award for remediation purposes, suggests that any award granted to the Respondent is actually unlawful unless its sole purpose is to remediate 285 Midwest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February, 2017.

_____

Erin Garbett

_____

Sabrina Molinari

_____

Rocco Scocco

Counsel for the Respondent
Midwest Properties Ltd.

PART VII -- TABLE OF AUTHORITIES

Paragraph No.

Cases

Government Publications

Statutes

Secondary Sources

LEGISLATION AT ISSUE (Optional)

Environmental Protection Act, RSO 1990, c E 19, s 1(1):

In this Act,

"adverse effect" means one or more of,

(a) impairment of the quality of the natural environment for any use that can be made of it,

(b) injury or damage to property or to plant or animal life,

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(e) impairment of the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,

(g) loss of enjoyment of normal use of property, and

(h) interference with the normal conduct of business; ("conséquence préjudiciable")

Environmental Protection Act, RSO 1990, c E 19, s 3(1):

The purpose of this Act is to provide for the protection and conservation of the natural environment. R.S.O. 1990, c. E.19, s. 3.

Environmental Protection Act, RSO 1990, c E 19, s 17

17. Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to,

(a) repair the injury or damage;

(b) prevent the injury or damage; or

(c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies. R.S.O. 1990, c. E.19, s. 17; 2005, c. 12, s. 1 (7).

Environmental Protection Act, RSO 1990, c E 19, s 19

19. (1) A certificate of property use, an order or approval of a court, the Minister, the Director or a provincial officer under this Act or a notice of the Director or a provincial officer under section 157.4 is binding on the executor, administrator, administrator with the will annexed, guardian of property or attorney for property of the person to whom it was directed, and on any other successor or assignee of the person to whom it was directed. 2001, c. 17, s. 2 (4); 2010, c. 16, Sched. 7, s. 2 (9).

Environmental Protection Act, RSO 1990, c E 19, s 99(1):

In this section,

"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income. R.S.O. 1990, c. E.19, s. 99 (1).

Environmental Protection Act, RSO 1990, c E 19, s 99(2):

> (2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (i) the spill of a pollutant that causes or is likely to cause an adverse effect,
>
> (ii) the exercise of any authority under subsection 100(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
>
> (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
>
> (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,
>
> from the owner of the pollutant and the person having control of the pollutant.

JOHN THORDARSON and
THORCO CONTRACTING LIMITED
APPELLANTS
(Respondents)

-and-

MIDWEST PROPERTIES LTD.
RESPONDENT
(Appellant)

S.E.M.C.C. File Number: 03-04-2017

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT MIDWEST PROPERTIES LTD.

TEAM #2017-08

Erin Garbett
Sabrina Molinari
Rocco Scocco

Counsel for the Respondent,
Midwest Properties Ltd.

Document #: 1121661